No. 91-1924

In the Supreme Court of the United States

OCTOBER TERM, 1992

AYUDA, INC., ET AL., PETITIONERS

v.

WILLIAM BARR, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Is it proper for the district courts to entertain lawsuits brought by aliens seeking adjustment of status, which challenge the Immigration and Naturalization Service's reasons for granting and denying that relief, notwithstanding 8 U.S.C. 1255a(f), which provides a single exclusive means of review in the courts of appeals for denials of adjustment of status?

2. If so, was this particular challenge ripe for adjudication?

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OPINIONS BELOW

The opinion of the panel of the court of appeals (Pet. App. 1a-64a) is reported at 948 F.2d 742. The opinions of members of the court of appeals respecting the denial of rehearing en banc (Pet. App. 65a-76a) are reported at 958 F.2d 1089. This Court's order vacating a prior judgment and remanding for reconsideration (Pet. App. 77a) is reported at 111 S. Ct. 1068. The original opinion of the panel of the court of appeals (Pet. App. 78a-164a) is reported at 880 F.2d 1325. The opinions of members of the court of appeals respecting the initial denial of rehearing en banc (Pet. App. 165a-172a) are unreported. A related opinion of the court of appeals (Pet. App. 173a-202a) is reported at 869 F.2d 1503. Several opinions and

orders of the district court (Pet. App. 203a-252a, 255a-261a, 262a-265a, and 279a-281a) are reported at 687 F. Supp. 650, 700 F. Supp. 49, and 744 F. Supp. 21, but other opinions of the district court (Pet. App. 253a-254a, 266a-272a, 273a-278a, and 282a-289a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1991. A petition for rehearing was denied on March 3, 1992. Pet. App. 65a-67a. The petition for a writ of certiorari was filed on June 1, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of the legalization program established by the Immigration Reform and Control Act of 1986 (IRCA). Among other things, that statute provided a one-time opportunity for certain aliens residing illegally in the United States to acquire legal residency, by permitting INS to adjust their status to that of an alien lawfully admitted for temporary residence. 8 U.S.C. 1255a. Pursuant to 8 U.S.C. 1255a(a)(2)(B), aliens who entered the country legally but later lost their lawful status were entitled to legalization only if their unlawful status was "known to the Government." The Immigration and Naturalization Service (INS) promulgated a regulation defining "known to the Government" to mean "known to the INS." 8 C.F.R. 245a.1(d) (1988).

2. Petitioners, various organizations that counsel and advise aliens, together with five individual aliens, filed this suit in the United States District Court for the District of Columbia, contending that the regulation incorrectly interpreted the eligibility requirements set forth in 8 U.S.C. 1255a. Although the government contended that jurisdiction was barred by 8 U.S.C. 1255a(f), the district court rejected that claim. On the merits, it concluded that petitioners' interpretation of the statute

was correct and enjoined INS from applying the challenged regulation. Pet. App. 203a-237a.

In a supplemental order (styled "Supplemental Order V"), the district court extended its original order to include aliens who had failed to provide INS quarterly or annual reports regarding their address as required by Section 265 of the Immigration and Nationality Act, 8 U.S.C. 1305 (1976), accepting petitioners' argument that the absence of such reports established that the status of such aliens was unlawful. Pet. App. 241a-242a.

3. Although the government did not appeal most aspects of the district court's ruling, it did appeal Supplemental Order V, reiterating its challenge to the district court's jurisdiction, and also contending that the district court had erred on the merits. The court of appeals reversed. Pet. App. 78a-164a. The court reasoned that because "an alien could challenge, on appeal from a deportation order, an interpretive regulation which causes the INS to deny his legalization claim, it follows that the district court lacked jurisdiction to hear the same claim in a different forum." *Id.* at 93a.

The court of appeals also concluded that the challenge to INS's policy with respect to aliens whose unlawful status had been revealed to the government only by their failure to file Section 265 reports was not ripe. Pet. App. 109a-120a. The court noted that the final INS authority on that point—the Legalization Appeals Unit—had not yet decided a case raising the issue, so the government's policy was not sufficiently resolved to permit the district court challenge. *Id.* at 111a.[1]

4. Petitioners then filed a petition for a writ of certiorari, No. 89-1018. On February 25, 1991, after this Court's decision in *McNary* v. *Haitian Refugee Center*,

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[1] The court of appeals denied petitioners' suggestion for rehearing en banc by a 5-4 vote. Pet. App. 165a-172a.

Inc., 111 S. Ct. 888 (1991), the Court granted the petition, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *McNary*. Pet. App. 77a.

5. When the case returned to the court of appeals, that court consolidated it with two appeals from related orders entered by the district court. The first appeal was the government's challenge to a district court order (Supplemental Order XIV) that effectively required the district court to grant work authorizations to aliens who claim that they are eligible for legalization under the district court's "known to the Government" orders, although they had not filed timely applications for legalization under IRCA, Pet. App. 279a-281a.[2] The second order before the court of appeals was petitioners' challenge to a district court order declining to order legalization of four individuals who improperly had obtained employment while holding visas granted under subparagraphs (A) and (G) of 8 U.S.C. 1101(a)(15), Pet. App. 266a-271a.

After reconsideration, the court of appeals adhered to its original determinations that jurisdiction was improper and that the challenge regarding Section 265 was not yet ripe. Pet. App. 1a-64a. On the jurisdictional point, the court explained that the *McNary* Court "was drawing a distinction between collateral issues (which might normally be procedural) and those that go to the heart of an applicant's claim." *Id.* at 12a. Because petitioners' claims essentially challenged the merits of INS legalization determinations, the court of appeals

[2] Supplemental Order XIV applies across the board to all aliens covered by petitioners' action. The district court's earlier orders made it clear, however, that this group of aliens included aliens who had failed to submit a timely application for legalization. See Supplemental Orders VII, IX, XI, XII (Pet. App. 245a, 247a-252a, 255a-261a, 262a-265a).

reaffirmed its conclusion that the district court should not have entertained the case. *Id.* at 20a-21a. The court also repeated its alternative holding that the Section 265 challenge was not yet ripe. Pet. App. 21a-26a.[3]

ARGUMENT

As discussed in our petition in No. 91-1826, *Barr* v. *Catholic Social Services, Inc.* (*CSS*), the decision of the court of appeals conflicts with the decision of the Ninth Circuit we have challenged in *CSS*. CSS Pet. 15-16; see CSS Reply Br. 1.[4] Accordingly, if the Court affirms the decision of the Ninth Circuit in *CSS*, it is likely that its reasoning will be inconsistent with the reasoning of the court of appeals that petitioners challenge in their first question presented. Accordingly, the petition should be held as to the first question presented.

Also, although we believe that the court of appeals' discussion of ripeness correctly identified an independent basis for dismissing petitioners' case, petitioners are correct in suggesting that the court of appeals' analysis of that question was intertwined with its jurisdictional analysis. See Pet. 24-29. Hence, the Court's disposition of *CSS* well may affect the ripeness analysis as well. Accordingly, the Court also may wish to hold the petition with respect to the second question presented.

Finally, although the opinions of the court of appeals in this case are considerably more detailed than the opinion of the Ninth Circuit in the *CSS* case, we do not believe there is any need to grant the instant petition with respect to the jurisdictional question and

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[3] The court of appeals denied petitioners' suggestion for rehearing en banc by a 6-5 vote. Pet. App. 65a-76a.

[4] We have provided counsel for petitioners with copies of our petition and reply brief in *CSS*.

consolidate the two cases. The petition in *CSS*, which the Court has granted, broadly frames the question presented, and should enable the Court to assess all of the parties' arguments regarding the appropriate scope of district court review of challenges to INS's reasons for granting or denying legalization under IRCA.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of the Court's disposition of No. 91-1826, *Barr* v. *CSS*.

Respectfully submitted.

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